Filed 12/29/09 Marriage of Nair CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

In re the Marriage of JAYRAJ and BINDU NAIR.	
JAYRAJ NAIR, Appellant, v. BINDU NAIR, Respondent.	C059661 (Super. Ct. No. SDR0026925)

This case involves consolidated appeals filed by Jayraj Nair (father) from four orders in which the family law court, inter alia, limited him to supervised visitation with his youngest son, substituted therapists for both sons, and awarded to respondent Bindu Nair (mother) attorney fees pursuant to Family Code section 271.[1]

Father contends the trial court erred by (1) ordering supervised visitation, (2) modifying a final custody order

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[1] Undesignated statutory references are to the Family Code.

absent a showing of changed circumstances, (3) prohibiting his sons from having contact with each other, (4) ordering him to pay to mother $75,000 as a sanction for increasing the cost of litigation, and (5) making various provisions for therapy in the ruling after the custody trial.

Mother argues that father's appeal from the three orders concerning visitation and therapy must be dismissed because they are nonappealable interim custody orders.

We shall conclude that father has properly appealed from the four orders. However, we reject his arguments and shall affirm the trial court's orders.

FACTUAL AND PROCEDURAL HISTORY

Father and mother married in July 1995. They had two sons: Suraj (born in July 1996) and Sujay (born in December 2003). The parents separated in July 2005.

On February 1, 2006, mother filed a petition for a domestic violence restraining order against father. The trial court issued an order to show cause and numerous temporary restraining orders. Three weeks later, father filed a petition for dissolution of marriage. The trial court consolidated the domestic violence matter with the family law case.

In March 2006, the parties were ordered to emergency mediation. In April 2006, mother filed an order to show cause requesting legal and physical custody of both children and disqualification of the mediator. The court denied her requests

and issued no interim order as to Suraj but limited father to visitation with Sujay.

During the remainder of 2006, the parties filed numerous motions regarding issues of custody and visitation.

In November 2006, the court entered a judgment of dissolution as to status only. At the time, Suraj was living with his father, and Sujay was living with his mother.

In March 2007, the trial court appointed counsel to represent Suraj and Sujay. The court also allowed Suraj to remain with his father and Sujay with his mother.

The parties filed numerous motions and declarations regarding custody and visitation during the remainder of the year.

Custody Trial

Over the course of several days in February 2008, trial was held on the issues of custody and visitation. Along with the custody and visitation issues, the trial court also heard father's civil harassment petition against the maternal grandfather. Father alleged sexual molestation and harassment of Suraj and Sujay. At the close of father's case-in-chief, the trial court dismissed the petition for lack of evidence.

On March 27, 2008, the trial court issued a written ruling following the custody trial. The court awarded the parents joint legal custody and found that the long-term best interests of the children would require joint physical custody. However, Suraj's estrangement from his mother necessitated therapy in

order to reestablish the bonds of that relationship. The trial court noted that Suraj had resisted such therapy, explaining:

"With the correct blend of parental encouragement and parental discipline, the two children of this marriage would appear to have a future of unlimited possibilities. [¶] Unfortunately, it is evident that the father has focused his energies on encouragement and not enough on discipline. Stated another way, the father has allowed the older son, Suraj, to make decisions which should be made by the parent. This is not in the long-term best interests of that child. This must stop. It is now time for the parent to be the parent and the child to be the child. [¶] Specifically, the father has allowed the child to dictate to him if, when, and under what circumstances the child will submit to counseling and therapy designed to allow the mother back into the child's life. Because the father has not fulfilled his promises in the past to see that the appropriate (and court-ordered) counseling was completed, it is now incumbent on this court to assume the role of parental decision maker as it relates to Suraj re-establishing a relationship with his mother. The Court intends to do this through the issuance of specific orders, to be set forth in detail in this decision, coupled with preimposed sanctions for failure to comply with those orders."

The trial court's ruling further stated, "Considering all the evidence presented, it is the Court's opinion that the long-term best interests of both children require an order of joint

physical custody. This order is based on the assumption that the father now intends to follow the orders of the Court. Failure to do so, especially as it relates to this Court's orders for counseling for Suraj, will be considered a change of circumstances warranting a modification of this joint physical custody order." The ruling also provided a detailed, two-tier visitation schedule.

The trial court concluded, "This Ruling will be the Statement of Decision unless within ten (10) days any party specifies controverted issues or makes proposals not covered in this ruling." A decision on mother's request for attorney fees was deferred.

The signed ruling was served on April 1, 2008, but it enjoyed no repose. Within a week, father filed an objection and request for clarification of the ruling.

On May 7, 2008, father filed an order to show cause seeking 50 percent physical custody of Sujay and to allow the children to travel with him to India. A week later, mother filed an order to show cause in which she sought, inter alia, supervised visitations between father and Sujay. That same day, the court granted the request for supervised visitation and ordered the children to have no contact with each other until a therapist was assigned to Sujay.

On May 27, 2008, mother filed an order to show cause to remove Suraj from his father and to make him a ward of the

court. On May 29, 2008, mother also requested that father be ordered to have no further contact with her.

Order – June 8, 2008

On June 8, 2008, an order was filed that reflected the trial court's May 19, 2008, ruling in which it denied father's objections to and request for clarification of the ruling after the custody trial. The order also substituted therapists for the children.

Order – June 12, 2008

On June 12, 2008, the trial court filed an order limiting father to supervised visits with Sujay. The court also confirmed its earlier ruling that there be no contact between the siblings until therapists were appointed for each child.

The month of June continued with a spate of filings in which mother and father accused each other of sabotaging each other's parental rights and undermining the therapy sessions for the children.

Order – July 8, 2008

On July 8, 2008, the trial court confirmed its earlier visitation orders, replaced therapists for the children, and ordered father not to contact mother. The court deferred ruling on both parents' requests for attorney fees.

Father filed his first notice of appeal on July 15, 2008. The notice of appeal appeals from orders "entered on 6/8/08; 6/12/08; 7/8/08."

Order Awarding Attorney Fees -- August 20 2008

On August 20, 2008, the trial court ordered father to pay to mother $75,000 in attorney fees as a sanction for increasing the cost of litigation. The court denied father's request for fees. Father's second notice of appeal followed on August 29, 2008.

DISCUSSION

I

Appealability

Mother moves to dismiss father's appeal from the June and July 2008 orders in which the court, inter alia, modified visitation and substituted therapists for the children. She contends these are interim custody orders for which father was required to obtain a certificate of probable cause before he could appeal. We disagree.

A

In California, the right to appeal is conferred exclusively by statute. (*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 109 [collecting cases].) In the absence of a statute authorizing an appeal, we lack jurisdiction to review a case even upon consent, waiver, or estoppel. (*In re Marriage of Lafkas* (2007) 153 Cal.App.4th 1429, 1434 (*Lafkas*).)

Code of Civil Procedure section 904.1 is the primary statute addressing appealability. Section 904.1 allows for appeal from a final judgment, an order after judgment, "an order made appealable by the provisions of the Probate Code or the

Family Code," and from various other orders not applicable to this case. (Code Civ. Proc., § 904.1, subds. (a)(1), (2) & (10).)

Mother asserts that none of the June or July 2008 orders from which father appeals is a final judgment. We agree. We also agree that the Family Code contains no provision rendering these orders appealable because the Code "contains no express provision governing appeals of child custody orders, except for those to enforce an order for the return of a child under the Hague Convention on the Civil Aspects of International Child Abduction." (*Enrique M. v. Angelina V.* (2004) 121 Cal.App.4th 1371, 1377.) Thus, the appealability of the June and July 2008 orders depends on whether they follow a previously entered judgment. (Code Civ. Proc., § 904.1, subd. (a)(2).) As we shall explain, we conclude that the trial court's ruling and orders of March 27, 2008, constitute a judgment. The orders of June and July 2008 are therefore appealable as orders after judgment.

Generally, the one final judgment rule applies to civil cases and provides that unresolved issues prevent a judgment from being final for purposes of appealability. (*Griset v. Fair Political Practices Com'n* (2001) 25 Cal.4th 688, 697; *Lafkas*, *supra*, 153 Cal.App.4th at p. 1432.) Family law cases often constitute an exception to the one final judgment rule because of the prevalent practice of bifurcating discrete issues for separate trials.

The usual method of bifurcation in family law cases involves entering an initial judgment dissolving the marriage and reserving jurisdiction over additional issues such as property division, support obligations, custody, and visitation. (E.g., *In re Marriage of Wolfe* (1985) 173 Cal.App.3d 889, 894; see also generally 3 Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2009) ¶¶ 11:475-11:476.1, pp. 11-113--11-114.)

Matters of custody, support, and division of property may be tried separately. "'When bifurcation of issues requires two or more separate trials, particular issues are tried at separate times, with each subject to a separate and distinct judgment.'" (*In re Marriage of Wolfe*, *supra*, 173 Cal.App.3d at p. 894.) If a separate judgment conclusively resolves the bifurcated issues, the judgment is appealable. "[J]udgments on issues tried after the 'status only' marriage dissolution judgment (i.e., 'further judgment on reserved issues') are separately appealable. E.g., if the court enters a judgment of dissolution but reserves jurisdiction over the community property division [citations], the subsequent property division judgment is separately appealable." (3 Hogoboom & King, Cal. Practice Guide: Family Law, *supra*, ¶ 16:274, p. 16-831.)

In a bifurcated family law case, determining whether a ruling on child custody or visitation constitutes a final judgment often requires pause for thought. Even though every order following a status-only judgment would seem to be an order

after judgment that Code of Civil Procedure section 904.1, subdivision (a)(2), renders appealable, orders are appealable only after a final judgment on the bifurcated issues.

As a practical reality, any judgment on issues of child custody or visitation may become outdated as children mature, parents seek to relocate their domiciles, visitation schedules require adjustment, and myriad other situations develop affecting the health and well-being of the children. Unlike property, which can be lastingly divided in the first instance, there can be no resolution certain to be permanently appropriate for growing children. Nonetheless, a judgment on custody and visitation can be sufficiently "final" for purposes of appealability.

Finality for purposes of appeal depends on the substantive effect of the family law court's ruling. When the court has conducted a trial and makes a conclusive ruling intended to adjudicate all pending issues of custody and visitation, the ruling constitutes a final judgment. (See *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1088, fn. 2 (*LaMusga*); *Enrique M. v. Angelina V.*, *supra*, 121 Cal.App.4th at p. 1378.) The conclusive nature of such a ruling renders it a "judgment" for purposes of appealability even though children's needs and parental fitness may change.

Here, the trial court issued a signed ruling after a trial on the issues of custody and visitation. Although the court adopted the ruling as its statement of decision, it did not

enter a formal judgment on the issues. The court's ruling contains findings regarding the circumstances of Suraj and Sujay's relationship with their parents and each other. The ruling also makes various orders regarding legal and physical custody, visitation, and articulates a two-tiered plan for reuniting Suraj with his mother and brother.

We construe the trial court's ruling of March 27, 2008, following the custody trial, as a final judgment on the issues of custody and visitation. "[I]t is well settled that the substance or effect of the judgment and not its designation is determinative of its finality. A memorandum of decision may be treated as an appealable order or judgment when it is signed and filed, and when it constitutes the trial judge's determination on the merits." (*Estate of Lock* (1981) 122 Cal.App.3d 892, 896.) The trial court's signed ruling, later adopted as a statement of decision, has the substantive effect of a judgment.

The orders that father specified in his first notice of appeal each followed what constitutes a final judgment. As orders after judgment, they are appealable under Code of Civil Procedure 904.1, subdivision (a)(2).

We reject mother's contention that the June and July 2008 orders are nonappealable temporary custody orders. (Cf. *Lester v. Lennane* (2000) 84 Cal.App.4th 536, 559.) Rather than being merely preliminary to a final custody determination, the trial court's June and July 2008 orders modified and enforced an extant final judgment. (See *Enrique M. v. Angelina V.*, *supra*,

121 Cal.App.4th at p. 1377.) Although the June and July 2008 orders may have seemed temporary in light of the quick succession of motions and oppositions filed by the parties, their displeasure with the circumstances involving the children did not render the orders temporary. Father has properly appealed from the June and July 2008 orders after judgment. (Code Civ. Proc., § 904.1, subd. (a)(2); *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 651-652.)

Mother focuses on father's statement in a prior petition for writ of mandate where he asserted the June and July 2008 orders were nonappealable.[2] Father's prior erroneous characterization of the orders' appealability does not defeat our jurisdiction to consider an appeal from orders made reviewable by Code of Civil Procedure section 904.1. In instances involving thorny questions of appealability, appellate treatises often recommend the simultaneous filing of a writ petition and a notice of appeal to ensure review. (E.g., 2 Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2009) ¶ 15:146.1 pp. 15-70.13--15-70.14; 1 Cal. Civil Appellate Practice (Cont.Ed.Bar 3d ed. 2009) § 3.10, p. 149.) Were a party's assertion of the need for writ

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[2] On April 9, 2009, we granted mother's request for judicial notice of a petition for writ of mandate that father filed with this court on July 2, 2008. (*Nair v. Superior Court of Placer County,* C059285.) We summarily denied father's writ petition on July 3, 2008.

review from a nonappealable order to estop it from appealing, aggrieved parties would be forced to choose between vehicles for appellate review in exactly those instances in which the choice is most perplexing. We decline to hold that father's prior attempt to seek writ review foreclosed his appeal from what we determine to be appealable orders.

Mother advances an additional argument to attack the appealability of the June and July 2008 orders. She urges us to conclude that these orders required a certificate of probable cause under section 2025 to authorize father's first appeal. In relevant part, section 2025 provides: "Notwithstanding any other provision of law, if the court has ordered an issue or issues bifurcated for separate trial or hearing in advance of the disposition of the entire case, a court of appeal may order an issue or issues transferred to it for hearing and decision when the court that heard the issue or issues certifies that the appeal is appropriate."

The type of bifurcation to which section 2025 applies differs from the bifurcation of marital status from issues of custody, support, or property division. The bifurcation to which section 2025 refers is the division of a single issue into separate parts to allow a determinative legal question to be resolved before applying the law to the facts.

The California Rules of Court provide guidance on when bifurcation of a single issue is appropriate. Rule 5.175(c)[3] provides: "The court may try separately one or more issues before trial of the other issues if resolution of the bifurcated issue is likely to simplify the determination of the other issues. Issues that may be appropriate to try separately in advance include: [¶] (1) Validity of a postnuptial or premarital agreement; [¶] (2) Date of separation; [¶] (3) Date to use for valuation of assets; [¶] (4) Whether property is separate or community; [¶] (5) How to apportion increase in value of a business; or [¶] (6) Existence or value of business or professional goodwill."

When the trial court has ordered bifurcation of an issue due to uncertainty or complexity of the legal principle to be applied, the parties may desire appellate clarification prior to expending resources on a trial potentially founded on legal error. The California Rules of Court authorize the trial court to issue a certificate of probable cause to allow an appeal from what would otherwise be a nonappealable, interim order. To this end, Rule 5.180(c)(1) provides: "A certificate of probable cause must state, in general terms, the reason immediate appellate review is desirable, such as a statement that final resolution of the issue: [¶] (A) Is likely to lead to

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[3] Undesignated rule references are to the California Rules of Court.

settlement of the entire case; [¶] (B) Will simplify remaining issues; [¶] (C) Will conserve the courts' resources; or [¶] (D) Will benefit the well-being of a child of the marriage or the parties." (Rule 5.180.)

Here, the issues of child custody and visitation were not bifurcated within the meaning of section 2025. The trial court's ruling after custody trial did not divide the issues of custody and visitation into parts but resolved them in a single, comprehensive ruling. This is not a case in which the correct standard for apportioning physical custody or the legal test for separating siblings was an issue separated from subsequent fact-finding. Instead, the trial court's ruling after custody trial comprehensively resolved the issues of where Suraj and Sujay should live and when they should be allowed to visit their parents and each other.

We deny mother's motion to dismiss father's appeals from the June and July 2008 orders because the orders are appealable under Code of Civil Procedure section 904.1, subdivision (a)(2).[4]

B

Mother acknowledges that father has properly appealed the August 2008 order granting attorney fees. "The orders directing

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[4] On May 28, 2009, this court denied mother's prior motion to dismiss father's appeal as moot. We now also deny mother's request for judicial notice of materials filed in support of her request to dismiss on grounds of mootness.

father to pay mother's attorney's fees are appealable orders." (*Banning v. Newdow* (2004) 119 Cal.App.4th 438, 444.)

C

Father's first notice of appeal specifies the orders "entered on 6/8/08; 6/12/08; 7/8/08." The March 27, 2008, ruling after trial was not included. His second notice of appeal specified only the later order concerning attorney fees.

Although an appeal from a judgment encompasses prior nonappealable orders (Code Civ. Proc., § 906), the converse is not true. An appeal from a post-judgment order does not encompass the prior judgment. Although a "notice of appeal must be liberally construed," an appellant must specify the judgment if it is to be reviewed on appeal. (Rule 8.100(a)(2) [requiring a notice of appeal to identify "the *particular* judgment or order being appealed"] italics added.)

Father may not challenge the March 27, 2008, ruling after custody trial because he has not specified it in his notice of appeal. "Despite the rule favoring liberal interpretation of notices of appeal, a notice of appeal will not be considered adequate if it completely omits any reference to the judgment being appealed." (*Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 46, quoting *Shiver, McGrane & Martin v. Littell* (1990) 217 Cal.App.3d 1041, 1045.)

For failure to specify the ruling after the custody trial, we cannot consider father's arguments that the ruling improperly ordered counseling for the children, erroneously required him to

pay for Suraj's court-ordered therapy, lacked power to issue "preimposed sanctions," and abused its discretion in failing to award him equal physical custody of Sujay.

II

June and July 2008 Orders Regarding Visitation and No Contact Between the Siblings

Father contends the trial court abused its discretion by ordering the separation of Suraj and Sujay in the absence of compelling circumstances. Father also complains that the trial court modified custody without conducting an evidentiary hearing. We reject the arguments.

A

We begin our review with the well-settled rule that "[a] judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness." (*LaMusga, supra,* 32 Cal.4th at p. 1093, quoting *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) To secure a reversal of child custody or visitation orders, an appellant must show how the trial court abused its discretion. (*Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255.) We find an abuse of discretion only when the trial court has acted in a manner that is arbitrary, capricious, or exceeds the bounds of all reason. (*In re Marriage of Rosevear* (1998) 65 Cal.App.4th 673, 682-683.)

As our Supreme Court has explained, "Under California's statutory scheme governing child custody and visitation

determinations, the overarching concern is the best interest of the child. The court and the family have 'the widest discretion to choose a parenting plan that is in the best interest of the child.' ([] § 3040, subd. (b).) When determining the best interest of the child, relevant factors include the health, safety and welfare of the child, any history of abuse by one parent against the child or the other parent, and the nature and amount of contact with the parents. (§ 3011.)" (*Montenegro v. Diaz, supra*, 26 Cal.4th at p. 255.)

Even though a family law court has wide discretion in making custody and visitation orders, the court "may enter an order which has the effect of separating siblings only when compelling circumstances dictate that such separation is in the children's best interest." (*In re Marriage of Williams* (2001) 88 Cal.App.4th 808, 809.)

B

Contrary to father's contention, the June 8 and 12, 2008, orders did not cause Suraj and Sujay to be separated from each other. The siblings already were living separately. By November 2006, Suraj was living with his father, and Sujay was living with his mother. The brothers' separation was not the product of a court order but arose from Suraj's estrangement from his mother and complete siding with his father. Because the younger child continued to reside with his mother, the siblings lived separately for at least a year and a half prior to June 2008.

Rather than separate the brothers, the trial court consistently sought to reunite them. In the ruling after custody trial, the trial court found that the long-term best interests of the children required that they eventually live together. Before the brothers could be reunited, Suraj's alienation from his mother would require substantial therapy in order to reestablish the bonds of their relationship. To reflect this reality, the court formulated a two-tier plan for reuniting Suraj with both his mother and brother. In the ruling after trial, the trial court noted that its plan would need to be modified "[s]hould Suraj's behavior result in detriment to Sujay . . . ."

The June 8 order reflects the trial court's continued commitment to ensuring that Suraj and Sujay received the necessary counseling to implement its reunification plan. The court entered an order substituting therapists "and prohibiting contact between the children, *until therapists are in place*, and until further orders of the court." (Italics added.) The trial court did not abuse its discretion in attempting to prevent the smoldering relationship between mother and Suraj from turning into a conflagration involving both sons. The trial court had discretion to allow the therapists sufficient time to work separately with Suraj and Sujay before matters became worse.

C

Father next contends the trial court's June 12 order erroneously modified custody on an ex parte basis. In so

arguing, father relies on subdivision (a) of section 3064, which provides: "The court shall refrain from making an order granting or modifying a *custody* order on an ex parte basis unless there has been a showing of immediate harm to the child or immediate risk that the child will be removed from the State of California." (Italics added.) We reject father's argument for two reasons.

First, the record shows the hearing addressed by the June 12 order was not conducted on an ex parte basis. The record shows mother submitted an ex parte request for an order shortening time before the hearing on modification of custody. Although the request to shorten time was granted, the court required mother to give notice of the hearing to father and to serve him with a copy of the order to show cause prior to the hearing. The court's minute order shows both father and mother were present at the hearing -- father was in propria persona and mother accompanied by counsel. At the hearing, both parties were sworn and testified.

An ex parte proceeding is one "in which not all parties are present or given the opportunity to be heard." (Black's Law Dict. (7th ed. 1999) p. 1221, col. 2; see also 1 Hogoboom & King, Cal. Practice Guide: Family Law, *supra*, ¶ 5:210, p. 5-89 ["Ex parte" orders are granted on one party's application and *without 'formal' notice* to the other party *or opportunity to be heard* in opposition"].) Because both parties were present and

heard on the issue of custody, the hearing was not conducted ex parte as father asserts.

Second, father wrongly assumes he had joint physical custody of Sujay when the trial court ordered supervised visitation. He bases his claim to joint physical custody on a sentence in the statement of decision that states: "Considering all the evidence presented, it is the Court's opinion that the long-term best interests of both children require an order of joint physical custody." Father mistakes the trial court's statement of a goal for immediate conferral of joint physical custody.

The quotation reflects the trial court's determination that joint physical custody was an aim for the parties to work toward by attending counseling and repairing strained relationships. Thus, the trial court imposed a two-tier visitation schedule and counseling orders in order to move the parties closer to a time when they would be able to share joint physical custody of both children. In the interim, the trial court granted father only limited visitation with Sujay. The statement of decision contemplated father having visitation with Sujay only every other weekend for a period of six months. This order reflected the reality that Sujay was living exclusively with his mother at the time.

At oral argument, father asserted that a parent cannot have joint physical custody if that parent has only limited visitation with the child. On this point, father emphasized the

case of *Marriage of Biallas* (1998) 65 Cal.App.4th 755. *Biallas* explains that a parent cannot have minimal visitation with a child and still be considered to have joint physical custody. As the *Biallas* court noted, "Joint physical custody exists where the child spends significant time with both parents." (*Id.* at p. 760.)

Here, the record does not indicate that father was spending any time with Sujay when the trial court issued its statement of decision. The trial court's granting of visitation on alternate weekends represented a planned *increase* of father's time with Sujay.

The planned increase never took effect because the trial court soon limited father's time with Sujay to short, supervised visits. However, even the planned two-hour supervised visits represented an increase in the amount of time father was entitled to spend with Sujay. The modification of visitation in the June 12 order did not diminish father's physical custody of Sujay. At the time, he had no physical custody of Sujay to lose.

The June 12 order was not made on an ex parte basis. The order also did not constitute a custody modification. Instead, the order merely modified father's already limited right to visitation. Accordingly, we reject father's argument that the court erroneously modified custody in its June 12 order.

D

Father contends no grounds existed for imposing the requirement for supervision of his visits with Sujay. Lacking a reporter's transcript of the hearing on which the June 12 order is based, we are compelled to assume that the trial court's order is correct and supported by adequate factual findings. (*Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.)

Prior to making the June 12 order, the trial court conducted a hearing on mother's request for supervised visitation. Mother had alleged that father hindered her right to have Sujay for Mother's Day, dropped off Sujay late despite express admonishment in the ruling after trial, and continued to alienate Suraj against her. The trial court granted her request for supervised visitation, and we presume that the evidence adduced at the transcribed hearing supported that ruling. (*LaMusga, supra,* 32 Cal.4th at p. 1093.)

The record is insufficient to undermine the presumed correctness of the trial court's order modifying father's right to visitation with Sujay.

III

August 2008 Order Regarding Attorney fees

Father argues the trial court erred in ordering him to pay $75,000 in attorney fees to mother. He contends that his conduct did not justify sanction under section 271, the trial court did not consider his ability to pay, and mother was at fault for driving up litigation costs. Father also urges us to

advise the trial court that it may not characterize the fees as "supplemental child support." We reject the arguments and decline to address an unripe issue.

A

Subdivision (a) of section 271 authorizes monetary sanctions in family law cases as follows: "Notwithstanding any other provision of this code, the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney's fees and costs pursuant to this section is in the nature of a sanction. In making an award pursuant to this section, the court shall take into consideration all evidence concerning the parties' incomes, assets, and liabilities. The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden on the party against whom the sanction is imposed. In order to obtain an award under this section, the party requesting an award of attorney's fees and costs is not required to demonstrate any financial need for the award."

An award of attorney fees pursuant to section 271 is reviewed for abuse of discretion. (*In re Marriage of Corona* (2009) 172 Cal.App.4th 1205, 1225-1226.) We reverse the trial court's order "only if, considering all of the evidence viewed most favorably in its support and indulging all reasonable

inferences in its favor, no judge could reasonably make the order." (*Ibid.*)

Here, the trial court's order awarding fees explains: "The above entitled matter came on for trial on various dates in February, May and June 2008. The issue of attorney fees was ultimately submitted to the Court on June 9, 2008. Having considered the evidence presented and the arguments of the parties the court finds and orders as follows. [¶] [Mother] seeks attorney fees in the amount of $75,000.00 pursuant to [] section 271 (a) based upon [father's] conduct which frustrated the policy of the law to promote settlement of litigation and reduce the costs of litigation. [Mother's] position on this issue is well taken. This Court's ruling is based in large part on [father's] repeated attempts to frustrate both the spirit and the letter of the Court's rulings with which he disagrees. For example, notwithstanding the Court's clear and unequivocal ruling that the children not be taken from the United States, he has persisted in pursuing this issue. Further, the attempts of the Court to start the reunification process between the older son and the [mother] has [*sic*] been frustrated by the [father's] disputes with the proposed counselors either by refusing to pay for the counseling or lodging complaints about the counselors' behavior with professional review boards. [¶] Therefore, the Court orders [father] pay to [mother] $75,000.00 as attorney fees pursuant to [] section 271."

B

Father contends the trial court erred in failing to consider his ability to pay the $75,000 sanction. The order is presumed correct, and father's failure to supply a reporter's transcript of any of the hearings in which the parties presented evidence and testimony on the issue leaves us with no basis for us to conclude otherwise. "Where no reporter's transcript has been provided and no error is apparent on the face of the existing appellate record, the judgment must be conclusively presumed correct as to all evidentiary matters. To put it another way, it is presumed that the unreported trial testimony would demonstrate the absence of error. (*Ehrler v. Ehrler* (1981) 126 Cal.App.3d 147, 153-154.)" (*In re Estate of Fain* (1999) 75 Cal.App.4th 973, 992.) Accordingly, we reject father's contention that the trial court failed to consider his ability to pay the sanction.

C

Father argues the trial court should have found mother to be at fault for the substantial litigation costs she incurred and that he did not file frivolous pleadings. To this end, father offers a detailed description of the vigorous litigation over custody and visitation that preceded the trial court's award of fees to mother under section 271. We are not persuaded.

Father's recount of the numerous motions filed by both parties demonstrates his perspective that the litigation cost was mother's fault. Even so, father fails to establish an abuse of discretion. "The showing on appeal is insufficient if it presents a state of facts which simply affords an opportunity for a difference of opinion." (*In re Marriage of Rosevear*, *supra*, 65 Cal.App.4th at p. 682.)

The trial court had sufficient basis for concluding that father's conduct during the two years prior to the August 2008 order justified sanctions under section 271. The trial court's order after custody trial explained that father had authority and control over Suraj but wholly failed to facilitate the reunification of the child with his mother. Rather than fulfilling his promises to ensure that Suraj complied with court-ordered therapy, father countenanced his son's obstinate behavior. Father had been sufficiently resistant to prior court orders that the ruling after the custody trial specified "preimposed" sanctions in the event that father failed to comply. The ruling after trial also took pains to point out that late drop-offs were unacceptable. Father's prior tardiness had established a pattern that the trial court needed to correct. In short, the ruling after custody trial, as well as the June and July 2008 orders, demonstrate that father habitually ignored or undermined court orders while persisting in reiterating the same requests.

The record also shows that father filed an unsubstantiated claim of sexual abuse and harassment by the boys' maternal grandfather. Mother was forced to prepare for and litigate this issue during the custody trial even though father's lack of evidence compelled dismissal of the allegations at the close of his case-in-chief. Father's serious allegation of misconduct further contributed to mother's litigation costs. The record indicates that mother paid well in excess of $75,000 in attorney fees prior to the trial court's August 2009 order imposing sanctions.

The trial court did not abuse its discretion in imposing sanctions in the amount of $75,000 under section 271.

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Father urges us to "offer an opinion" on whether the trial court may "characterize the $75,000 in attorney fees as child support . . . ." Father's argument on the issue is premature because the trial court has not yet ruled on mother's request. The court may deny mother's request to characterize the award of fees as supplemental child support, thereby obviating father's argument. (Cf. *Kinoshita v. Horio* (1986) 186 Cal.App.3d 959, 967.) For this reason, we decline to address the unripe issue.

DISPOSITION

The orders filed on June 8, June 12, July 8, and August 20,

2008, are affirmed. Mother shall recover her costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

SIMS, J.

We concur:

SCOTLAND, P. J.

HULL, J.